

IN THE MATTER OF The Matrimonial Property Act 1976

A N D

IN THE MATTER OF An application for Occupation Orders

BETWEEN SHIRLEY ANN PRICE

of 33 Tongariro
Street, Hamilton,
Married Woman

Appellant

A N D DEREK PRICE

of Hamilton, Fork
Lift Driver

Respondent

Counsel: J.P. Geoghegan for Appellant
R.M. Sprott for Respondent

Hearing and
Ruling: 6 November 1984

ORAL RULING OF GALLEN J.

This is an appeal under the provisions of the Matrimonial Property Act 1976 and the appellant raises the preliminary point of wishing to call additional evidence. During the course of his decision, the learned District Court Judge stated:-

"The burden of establishing that an agreement is unfair and unreasonable rests of course with Mrs Price. It seems to me that the possibility

of another hip operation must have been a very real one for her after the operation in 1981 and that even if such possibility was not on the horizon for some time, regrettably she should have prudently taken cognizance of the possibility before she entered into the agreement of 3 August."

The appellant seeks now to adduce additional evidence from an orthopaedic specialist who would indicate, as I understand the position, that Mrs Price need not have been aware of the likelihood of another operation before the agreement was signed. In her evidence, Mrs Price stated:-

"As regards the hip operation which I expect on my left hip which I haven't had, I did not know of the need for that operation at the time I signed the separation agreement. I found out on the 14th of October."

The agreement was in fact signed in August 1983. Generally speaking, additional evidence on an appeal is permitted only in an exceptional case, see Doak v. Turner (1981) 1 N.Z.L.R. 18 and there are good reasons for this. There are a number of decisions which apply in the ordinary case in deciding whether or not additional evidence is to be called, perhaps the most appropriate one of these is the need to show that the evidence could not have been obtained with reasonable diligence for use at the initial hearing.

Clearly in this case the evidence of the orthopaedic surgeon could have been obtained, but Mr Geoghegan says that that course was not adopted because the position was

not contentious and not seriously in issue between the parties.

A second point which is usually of some significance is that the evidence must be of such a nature that if given it would probably have an important influence on the result although it need not be decisive. In this case, there is no doubt that the learned District Court Judge did take into account his finding that Mrs Price should have had in mind the possibility of further operative treatment, but in referring to that, he also makes reference to the absence of medical evidence and he goes on to say towards the end of his decision that he reached the conclusion which he did even if he accepted that there had been a change of circumstance for Mrs Price.

On that basis, it would be difficult to satisfy the second criterion. The third relates to the nature and credibility of the evidence. That is not a point which is in issue here. Mr Geoghegan makes the submission that there is a wider discretion to admit further evidence in matrimonial property cases and in support of that, he cited the decision of the Court of Appeal in Castle v. Castle (1980) 1 N.Z.L.R. 14. It is I suppose also reasonable to say that because the section in respect of which this appeal arises refers to other considerations, that there should be a wider discretion and I accept this. However, Castle v. Castle itself makes it clear that any additional evidence should not be put before the Court unless there are exceptional reasons and indeed it is easy to

see that this should be, particularly in areas as contentious as matrimonial property where the parties are likely to place considerable emphasis on the reasons for a decision which they find difficult to accept.

Clearly this is a case where the evidence was available. Quite clearly the learned District Court Judge while considering it, did not regard it as decisive because he went on to consider the other matters which related to the exercise of his discretion. Having regard to the overall circumstances, I do not propose to allow the evidence to be called.

R. G. Galloway

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